84-1250

No. _____

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Kansas

ON PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

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QUESTIONS PRESENTED

1. Whether or not the defendant was denied his Sixth Amendment Right of Compulsory Process when the Court refused to allow the defendant to present evidence that he had been previously misidentified for another man who is his "Look Alike" or "Double" who had committed a somewhat similar crime the very next day after this crime occurred in the same area.

2. Whether or not the physical lineup in this case was deficient because of the following factors: (1) the lineup contained only two men besides the defendant, neither of whom fit the description of the individual who committed the crime, (2) the witnesses sat together in the lineup room during the lineup at the same table, (3) there was some evidence of conversation between the witnesses during the lineup, (4) prior to the lineup the victim was told by a detective that the individual who attacked her was under arrest, had a previous criminal record, and that there would be other individuals at the lineup to identify him.

3. Whether or not polygraph evidence should be admissible or at least whether or not the trial court should conduct a hearing in relation to polygraph evidence submitted by the defendant.

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

The Petitioner, Jerry Ray Messer, respectfully prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Kansas entered in this proceeding on October 26, 1984, along with the Supreme Court of Kansas' denial of the Petitioner's Motion for Rehearing on December 6, 1984.

OPINION BELOW

The Opinion of the Supreme Court of the State of Kansas is unpublished and is appended hereto. The Order of the Supreme Court of Kansas, denying a Motion for Rehearing, without Opinion, is appended hereto.

JURISDICTION

The Judgment of the Supreme Court of the State of Kansas was rendered on October 26, 1984. A timely Motion for Rehearing was filed in the Supreme Court of the State of Kansas and was denied on December 6, 1984, and this Petition for Certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 U.S.C., Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United states provides in part: In all criminal prosecutions, the accused shall enjoy the right to...have compulsory process for obtaining witnesses in his favor.

The Fourteenth Amendment to the Constitution of the United States provides in part: ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was convicted of aggravated kidnapping in violation of K.S.A. 21-3421 and aggravated battery in violation of K.S.A. 21-2414. On the aggravated kidnapping conviction the defendant was sentenced by the Court to a term of life imprisonment. On the aggravated battery charge the defendant was sentenced to a term of not less than five (5) nor more than fifteen (15) years. At the defendant's trial, the following facts were developed.

Wanda Albertson was the victim of an apparent attempted aggravated robbery at an antique store owned by her and her husband located in Mission, Kansas. The store is located in a small shopping area in an exclusive area of Metropolitan Kansas City. No other employees or customers were present when the apparent robber entered the store

and began to browse around looking at the merchandise at about 10:00 o'clock A.M. on the morning of March 31, 1982. Suddenly the robber produced a handgun and threatened death. He said that if she (Mrs. Albertson) didn't scream he wouldn't kill her. The man then said that he wanted Mrs. Albertson to go to the back of the shop with him. At the back of the shop was the cash register. Mrs. Albertson ignored the robber's order and began to scream, whereupon the robber pistol whipped Mrs. Albertson and left the store. Mrs. Albertson was found semi-conscious approximately fifteen feet from where she last remembers being confronted by the robber. The detectives investigating the case investigated the case as an attempted aggravated robbery. The robber was in the antique store for perhaps a total of five or six minutes. Part of that time Mrs. Albertson was moving furniture outside of the store. Aside from the time that Mrs. Albertson was moving furniture Mrs. Albertson had perhaps a minute and a half or two minutes to look at the man in the store before he pulled a gun on her. The description of the individual who committed the crime at Albertson's antique store that was given to the police by the victim, Mrs. Albertson, was as follows: (1) white male (2) mid thirties (3) five foot ten (4) 160 pounds (5) medium colored brown hair (6) bald spot on top, long on the sides, receding hair line.

On April 1, 1982, the very next day after the thwarted robbery at Albertson's antique store, a robbery occurred at Topsy's Ice Cream Parlor in Kansas City, Missouri. The robbery occurred in the same general area of Metropolitan Kansas City. The Topsy's Ice Cream Parlor is located only approximately four miles from Albertson's antique shop. At the Topsy's robbery the robber again entered the store at a time when only one employee was present, a clerk named Abbey Mirkin. The employee in Topsy's, as in the Albertson's case, was female. Again the store was empty except for the one female employee. Again the robber produced a small handgun and threatened death. Again the robber was apparently acting alone. He said "This is a stickup. Give me the money." The victim gave him the money whereupon he

said "Lay down on the floor and count to one hundred or I'll blow your head off." This time the victim of the robbery had complied and the robber left the store. The description of the Topsy's robber given to the police by the victim Abbey Mirkin matched the description of the man who was in Albertson's antique store: (1) white male (2) age 30 to 35 to 40's (3) height five feet ten (4) medium build 150-160 pounds (5) dark long hair (6) bald spot on top (7) receding hair line (8) bushy moustache. Detectives assigned to the crimes apparently believed that possibly the same man committed both crimes and somewhat coordinated their investigations.

Three women in a beauty shop next door to the antique store had seen a man walking down the street in front of their shop while they were working. The women only saw a profile view of the man; he was some distance from where they were in the shop. The women identified the defendant, Jerry Messer, as the man they saw from a photographic lineup. The victim, Mrs. Albertson, however, when shown the photographic lineup while recuperating in the hospital, stated that Mr. Messer was definitely not the man who was in her shop on the day in question. In the meantime, Abbey Mirkin, the victim in the Topsy's case, positively identified Jerry Messer from a photographic lineup conducted by detectives working the Topsy's case.

On April 13, 1982, a physical lineup was conducted by the detectives working both cases. Mrs. Albertson, the witnesses in the beauty shop, and Abbey Mirkin (the Topsy's victim) all viewed the lineup together in the same room. The witnesses were all sitting together at one table approximately a foot to a yard apart from each other at the table. The lineup was only a three man lineup. The important physical characteristics that the witnesses from the Albertson case remembered about the robber was the fact that he had a very receding hair line and a very bushy moustache. The defendant, Jerry Messer, was the only man in the lineup who had a bushy moustache and a receding hair line. The other two men had very thin moustaches and a full head of hair. Abbey Mirkin positively identified Jerry Messer as the Topsy's robber at the physical lineup. The

beauty shop witnesses also identified Jerry Messer as the man they saw and Mrs. Albertson, despite her prior statement that Mr. Messer was not the individual who was present in her store, this time identified Mr. Messer. The police, apparently believing all along that the same man committed both crimes, were now convinced that Jerry Messer was that man and arrested him for both crimes after the lineup.

It was then, however, that a rather startling development occurred. The robbery at Topsy's had been videotaped by a hidden movie camera. As indicated above, the victim of the Topsy's robbery, Abbey Mirkin, had positively identified Jerry Messer as the robber at the photographic lineup and at the physical lineup. She then subsequently identified him positively at the preliminary hearing in the Topsy's case. However, several frames from the videotape of the robbery were removed and blown up. The blown up frames showed conclusively that Jerry Messer was not the man who robbed Topsy's and that Jerry Messer was therefore the victim of a misidentification by Abbey Mirkin, the Topsy's victim. The Topsy's case was labeled a case of mistaken identity and dismissed by the prosecutor. Although the pictures after being blown up showed conclusively that Jerry Messer was not the Topsy's robber, the pictures also showed that Jerry Messer bears an uncanny resemblance to the Topsy robber. Their appearance was very similar in that both had a very receding hair line, the same color of hair, a bushy moustache, and both were of approximately the same height, weight and the same approximate age.

At the trial of the Albertson's case, the prosecutor Morrison, after having viewed the photographs and talked with the prosecutor in the Topsy's case, was prepared to stipulate that Mr. Messer was not the Topsy's robber and it was a case of mistaken identity.

Prior to trial in the present case the defendant filed a motion to predetermine the admissibility of the evidence regarding the Topsy's case. The defendant contended that the Topsy's evidence showed that the defendant had a look

alike who committed a somewhat similar crime in the same area of Kansas City during the same time frame that the Albertson's incident occurred. Defendant argued that the police believed the same man committed both crimes, that the investigations by the police were somewhat coordinated, and that the witnesses from both cases attended the same lineup. The defendant pointed out that he had already been mistaken for his look alike once, and already been wrongfully charged once for a crime that his look alike had committed. The trial court before the trial refused to allow any evidence whatsoever on this matter.

The defendant also filed motions to suppress the physical lineup as well as the in-court identifications of the witnesses. These were all overruled by the trial court.

Prior to trial, the defendant Jerry Messer submitted to a polygraph examination given by a highly reputable polygraph examiner from Kansas City. The polygraph examiner had a college degree in polygraph science, had worked solely as a polygraph examiner for approximately seven years, and had conducted thousands of polygraph examinations. He was an ex-police officer. The polygraph examiner used the most up-to-date methods of polygraph examination and also used the most sophisticated equipment available. After his examination it was the examiner's definite opinion that the defendant is, in fact, totally innocent in relation to this case.

Part of the defendant's defense in this case was alibi. A witness for the defendant was able to positively verify that he was with the defendant on the day in question and that the defendant was not even in Kansas City at the time he was supposed to have committed these crimes. Prior to trial, the same polygraph examiner administered a test to the alibi witness and concluded that the alibi witness was telling the truth as regards to his statement of alibi.

The defendant filed a written proffer of proof offering into evidence the testimony regarding the Topsy's robbery as well as the fact that the defendant and his alibi witness had passed the polygraph test.

The State's case rested solely upon eyewitness identifi-

cation evidence. No other evidence existed, either physical or circumstantial, to connect the defendant Jerry Messer with the crimes in question.

REASONS FOR GRANTING THE WRIT

QUESTION NUMBER 1. Whether or not the defendant was denied his Sixth Amendment Right of Compulsory Process when the Court refused to allow the defendant to present evidence that he had been previously misidentified for another man who is his "Look Alike" or "Double" who had committed a somewhat similar crime the very next day after this crime occurred in the same area.

As indicated in the Statement of the Case, the defendant apparently has a "double" or "look alike" who committed a somewhat similar crime the very next day after this crime was committed in the same area of Kansas City. The State still disputes that the crimes were similar due to the fact that in the Albertson's case there was violence while the next day in the Topsy's case there was no violence. It seems almost obvious to point out that in the Albertson's case the victim did not cooperate, i.e. she screamed when she had been told not to. Then, in the Topsy's case, the victim did cooperate and there was no violence. It is reasonable to assume that had Mrs. Albertson cooperated there may not have been any violence in the first case. It was this distinction that caused both the trial court and the Kansas Supreme Court to refuse this defendant the right to call witnesses establishing what had happened at the Topsy's store and his wrongful identification in relation thereto.

There were a number of factual similarities between the two crimes. In both cases the store was deserted with the only person in the store being the employee that was robbed. In other words, in both cases there were no other employees or customers in the store. Both stores were located in small shopping centers. Both stores were located in an exclusive area of the Metropolitan Kansas City Area.

The stores were located only four miles apart. The attempted robbery at Albertson's antique store occurred on March 31, 1982 and the armed robbery at Topsy's occurred on April 1, 1982, only one day apart. In both cases the robber produced a hand gun. In both cases, the robber threatened death to the victim.

It is, however, the physical descriptions that produced the most remarkable similarity. The descriptions were almost identical.

Description of Topsy's Robber	Description of Albertson's Antique Store Robber (Given to Detective Doyle by victim shortly after crime was committed)
(1) White male	(1) White male
(2) Age 30 to 35	(2) Mid 30's
(3) Height 5'6'' to 5'8'' to 5'10''	(3) 5'10''
(4) 160 pounds	(4) 160 pounds
(5) Dark brown hair	(5) Medium colored brown hair
(6) Receding hair line, bald spot on top, long on the sides	(6) Bald spot on top, long on the sides, receding hair line
(7) Bushy moustache	(7) The individual was described by other witnesses as having a bushy moustache.

(The victim, Abbey Mirkin, was talked to by several different police and there were several police reports. Her description on age varied in that at one time she indicated the robber was in his forties and also her description of weight varied in that at one time she described him as being 150 pounds)

In concluding that the crimes were not similar apparently the Kansas courts applied a very high or restrictive similarities test. The defendant cited four cases to the Court which were factually similar and urged the Court to follow their rulings. Those cases were *Holt v. United States*, 342 F. 2d 163 (5th Cir. 1965); *Commonwealth v. Murphy*, 185 N.E. 486 (1933); *State v. Jackson*, 551 S.W. 2d 351 (1977); *State v. Bock*, 39 N.W. 2d 887 (1949). These cases hold that where the identity of a defendant is an important issue, evidence showing that another person similar in appearance to the defendant was committing similar crimes at or about the same time and that one person had mistakenly identified the defendant as such criminal is admissible if not too remote in time, not too weak in probative quality and if so connected with the act forming the issue on trial as to indicate relevant relationship.

Other courts in other jurisdictions have applied somewhat different standards in refusing to allow exculpatory evidence offered by the defendant to show that someone else committed the crime. *Burke v. State*, 642 S.W. 2d 197 (1982); *United States v. Hallman*, 439 F.2d 603 D. of Col. (1971).

In a case arising out of the state of California, a Ninth Circuit Court of Appeals applied a much different test than that applied by the courts in *Holt, Jackson, Bock,* and *Murphy.* The Ninth Circuit Court of Appeals held that evidence that another individual committed the crime even when reliable and relevant can be excluded under certain circumstances. The test to be applied includes such issues as whether or not the probability that the admission of the evidence will necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues or mislead the jury. *Perry v. Rushen,* 713 F.2d, 1447 (9th Cir. 1983).

In other words, even though the evidence may be relevant, reliable and exculpatory the Ninth Circuit Court of Appeals held that it may be excluded applying the above balancing test.

This decision is in conflict also with *State v. Garfole*, 76

N.J. 445, 388 A.2d 587 (1978). In *Garfole* the defendant was attempting to introduce other crimes evidence. The appellate court said at 388 A.2d 590:

> The same concept of relevancy which justifies submission of other crimes evidence by the state supports it when proffered by the defendant.
>
> The trial court imposed upon the defendant the same standards of degree of similarity of the several incidents as would apply if the offer of evidence was by the state.

The appellate court in *Garfole* found that to impose such a standard was improper and reversible error. The court went on to say at p. 591:

> We are of the view, however, that a lower standard of degree of similarity of offenses may justly be required of a defendant using other crimes evidence defensively that is exacted from the state when such evidence is used incriminatorily.

Although it is difficult to tell from the opinion from the Kansas Supreme Court which standard the Court used, apparently it must have been a standard that required a high degree of similarity. This is apparently in conflict with the holding of the Court in *Garfole*. The holding of the Court in *Garfole* is in conflict or a totally different standard than that imposed in *Perry v. Rushen*, supra. *Perry v. Rushen*, as indicated previously, is in conflict with *Holt, Bock, Jackson* and *Murphy*.

This type of evidence is extremely important in criminal cases. Whenever reliable or relevant evidence indicating that someone else committed a crime is available, that evidence should be admitted in court. It is simply too important to be left out because of how much time it will consume or because of some irrelevant dissimilarity. This case presents some questions that are important. What standard does apply when the defendant is attempting to introduce exculpatory evidence of this nature? Should a balancing test apply with one of the factors being the amount of time this type of evidence would consume? Should the courts be encouraged to admit this type of evidence?

QUESTION NUMBER 2. Whether or not the physical lineup in this case was deficient because of the following factors: (1) the lineup contained only two men besides the defendant, neither of whom fit the description of the individual who committed the crime, (2) the witnesses sat together in the lineup room during the lineup at the same table, (3) there was some evidence of conversation between the witnesses during the lineup, (4) prior to the lineup the victim was told by a detective that the individual who attacked her was under arrest, had a previous criminal record, and that there would be other individuals at the lineup to identify him.

As indicated in the Statement of the Case, all the witnesses who viewed the lineup were sitting together in the same room at the same table only a short distance apart. The victim, who had previously seen the defendant's picture and said it was not him, was told by detectives that they had arrested the man who had assaulted her. The detective also told the victim that the man had a prior criminal record and that there would be other people there to identify him for other crimes. There was also evidence produced at trial that indicated there was at least some conversation between the witnesses in the witness room during the lineup. It was only a three man lineup and the defendant was the only man that had the important identifying characteristics of a bushy moustache and a very receding hair line.

It should perhaps be noted that there is no question that this physical lineup was the type of lineup that could produce a misidentification. It is undisputed that the lineup did in fact produce a misidentification. Abbey Mirkin, the Topsy's victim, misidentified Jerry Messer as the Topsy's robber at that same lineup.

It is also relevant to note that three man lineups have been often frowned upon. See *People v. Kinzie*, 334 N.E. 2d 872 (Ill. 1975); *Porter v. State*, 397 N.E. 2d 269 (Ind. 1979); *Stack v. State*, 175 Ind. 525, 372 N.E. 2d 1201 (1970). Various police textbooks suggest that varying numbers of individuals be used in lineups. Also lineups conducted in other countries usually require or suggest that a certain

number of individuals be present in the lineup besides the suspect. In *Simmons v. United States*, 390 U.S. 377 (1968) this court hinted in a footnote that in a photographic lineup it would be preferable to have more than six snapshots. *Simmons v. United States*, 390 U.S. at 387.

As a practical matter police officers, being human and often believing strongly that they have the correct man, sometimes will use as few men in the lineup as they can get away with. It is not unusual to see three or four or five man lineups. Absent exigent circumstances, there is no excuse for a lineup containing so few individuals.

At least six individuals, if possible, should be presented at a lineup. The defendant realizes it would be difficult to proclaim an absolute bar on lineups that contain less than six individuals. Nevertheless it is very important to have as many individuals of similar appearance in the lineup as possible. It would perhaps be beneficial for this court to indicate more strongly that as many individuals as possible should be used in a lineup besides the suspect.

Physical lineups are critical and in general relate to the problem of the unreliability of eyewitness identification testimony. This court has previously recognized the inherently suspicious nature of eyewitness identification evidence. This court has noted that the hazards of such testimony are established by a formidable number of instances in the records of English and American trials. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. *United States v. Wade*, 388 U.S. 218 (1967) and *Manson v. Brathwaite*, 432 U.S. 98 (1977).

It is therefore critical that physical lineups be conducted by the police in a fair and proper manner. This case presents a number of questions in relation to physical lineups. Should the witnesses sit together during the lineup and when they make their identifications? Should the witnesses be allowed to talk during the time that they sit together at and during the lineup? Is it proper for the police to advise the witnesses that an individual is already under arrest, that the individual has a criminal record, and that other individuals will be

there to identify him in relation to other crimes? Is it a good practice to only have three individuals in a lineup even though there are no exigent circumstances?

QUESTION NUMBER 3. Whether or not polygraph evidence should be admissible or at least whether or not the trial court should conduct a hearing in relation to polygraph evidence submitted by the defendant.

As indicated in the Statement of the Case, the defendant in this case passed a polygraph examination given by a highly skilled and reputable polygraph examiner. His alibi witness also passed a polygraph test given by the same examiner. The rule barring polygraph examination evidence in the courts was first announced in the landmark case of *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923). In that case Frye had been convicted of murder. Frye had submitted to a crude polygraph examination. Frye passed the test but was convicted anyway. The *Frye* case has been cited over and over as the landmark case denouncing polygraph evidence. It is perhaps the height of irony that Frye was later found not to have committed the murder. After Frye spent three years in prison, another man confessed to the crime and Frye was released.

It is clear, however, that there is now a trend towards more use of polygraph evidence in the courts. In *State v. Dorsey*, 88 N. M. 184, 539 P.2d 204 (1975) the New Mexico Supreme Court held that polygraph examinations have advanced to the degree that they are sufficiently reliable to be generally admissible in a court of law. Massachusetts also allows polygraph evidence but has not gone as far as New Mexico. The landmark case in Massachusetts is *Commonwealth v. A Juvenile*, 365 Mass. 421, 313 N.E. 2d 120 (1974), App. after remand, 370 Mass. 450, 348 N.E. 2d 760. In *People v. Barbara*, 400 Mich. 352, 255 N.W. 2d 171 (1977) the Michigan Supreme Court gave serious consideration to the issue of polygraph evidence. After much discussion the court decided that the trial court should hear polygraph evidence at hearings on motions for new trials.

Several other state courts appear to be divided on the issue. See *Witherspoon v. Superior Court*, 133 Cal. App. 3d 24, 183 Cal. Rptr. 615 (1982); *People v. Daniels*, 102 Misc. 2d 540, 422 N.Y.S. 2d 832 (1979); and *State v. Sims*, 52 Ohio Misc. 31 369 N.E. 2d 24 (1977).

The changes are also evident in the federal court system. In *United States v. Ridling*, 350 F. Supp. 90 (D.C. Mich. 1972) polygraph examinations were allowed into evidence at the discretion of the trial court. This decision was later disapproved but not expressly overruled. In *United States v. DeBetham*, 348 F. Supp. 1377 (D. C. Cal. 1972) aff'd 470 F. 2d 1367 (9th Cir. 1972) the trial court exhaustively discussed polygraph evidence and very reluctantly decided not to allow it into evidence. The Court indicated that it felt that it was bound by a precedent.

The Seventh Circuit Court of Appeals apparently holds that trial courts have the discretion to refuse or admit polygraph evidence and that polygraph evidence may be admitted under certain exceptional circumstances. *United States v. Sweet*, 548 F. 2d 198 (7th Cir. 1977); *United States v. Burstein*, 560 F. 2d 779 (7th Cir. 1977). The rule in the Ninth Circuit is apparently the same as in the Seventh Circuit. *United States v. Infelice*, 506 F. 2d 1358 (7th Cir. 1974) and *United States v. Marshall*, 526 F. 2d 1349 (9th Cir. 1976).

The majority of state courts have now come to trust polygraph evidence enough that the majority rule is that polygraph evidence is admissible when it is stipulated to by both parties. The unfortunate result of this rule is that often whether or not a criminal defendant will be able to avail himself of polygraph evidence depends upon the attitude and beliefs of a particular county attorney or assistant county attorney assigned to his case.

There is no question that the polygraph technique has continued to be refined and has continued to advance. For excellent works assessing the accuracy of a polygraph examination administered by a skilled expert see e.g. Cureton, *A Consensus as to the Validity of Polygraph Procedures*, 22 Tenn. L. Rev. 728, 729 (1953) (97%); Pfaff, *The*

Polygraph: An Invaluable Judicial Aid, 50 A.B.A.J. 1130, 1132 (1964) (99%).

The noted commentator McCormick has written in his celebrated work on evidence, McCormick, C.T., *Evidence*, p. 369 (West Publ. 1954)

> [The] technique has much to contribute to the difficult process of judicial factfinding. It has been widely and successfully employed in criminal investigation and in business. We cannot in our hearts be so confident of the reliability of the present system of resolving conflicts in testimony by impeachment, cross examination and inferences from demeanor, that we can afford to reject scientific aid in the task... Obviously, the lie detector tests have substantial probative worth... [The] courts' wholesale exclusion of lie detector test results, for want of scientific acceptance and proved reliability, is not supported by the facts. Many courts can easily recede from this position, in a case where the foregoing facts as to acceptance and reliability are adequately proven by the expert himself as a foundation for his testimony giving the test results. In most of the cases where the results were held inadmissible no such foundation was laid.

In all probability the trend towards the admissibility of polygraph evidence will continue until there is even a wider split among the state and federal courts on the subject. It would perhaps be beneficial for the United States Supreme Court to issue some guidelines as to under what circumstances such evidence should be admissible and what rules should be applied. As indicated above, it is apparent that there is definite conflict among the courts of the United States as to what position should be taken towards polygraph evidence:

1. Some federal courts of appeals are apparently in conflict with each other, i.e. the Seventh and Ninth Circuits apparently have a somewhat different rule than the other circuits.

2. The decisions of the Seventh and Ninth Circuits allowing polygraph evidence in unusual or limited circum-

stances is in conflict with some state courts who totally bar polygraph evidence under any circumstances or absent a stipulation.

3. Many state courts are in conflict with many other state courts. In New Mexico and Massachusetts polygraph evidence is generally admissible. In some other states polygraph evidence is admissible with a stipulation from both parties. Then, in still other courts, polygraph evidence is totally barred.

4. Finally, and perhaps the most distressing, is the fact that where polygraph evidence is admissible with a stipulation from both parties, whether or not there will be such a stipulation often depends upon the attitude of the individual prosecutor assigned to the case. Accordingly, whether or not the defendant will be able to avail himself of polygraph evidence often depends upon the policy of the county attorney or district attorney in the county where there is jurisdiction. Or, as often is the case, whether or not there will be a stipulation depends upon the attitude of the individual assistant district attorney or assistant county attorney assigned to the case.

Had Jerry Messer been prosecuted in New Mexico or Massachusetts he probably would have been acquitted due to the strong polygraph evidence indicating his innocence or, had Jerry Messer's case been assigned to a prosecutor who accepted polygraph evidence, the case may not have been prosecuted at all.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Kansas Supreme Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF KANSAS

State of Kansas, *Appellee*,

v. No. 83-56227-S

Jerry R. Messer, *Appellant*.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

DENIED.

Date December 6, 1984

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

NO. 56,227

STATE OF KANSAS,
Appellee,

v.

JERRY MESSER,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson district court, ROBERT G. JONES, judge. Opinion filed October 26, 1984. Affirmed.

Michael Redmon, of Kansas City, argued the cause and was on the briefs for appellant.

Paul J. Morrison, assistant district attorney, argued the cause, and **Dennis W. Moore**, district attorney, and **Robert T. Stephan**, attorney general, were with him on the brief for appellee.

Per Curiam: Jerry Messer appeals his jury trial conviction of aggravated battery (K.S.A. 21-3414) and aggravated kidnapping (K.S.A. 21-3421).

The victim herein, Wanda Albertson, was the owner of an antique shop on Dearborn Street in Mission, Kansas. On March 31, 1982, Mrs. Albertson opened the shop at 10:00 a.m. Shortly after the shop opened, a man entered and began looking at some antique furniture. There were no other persons present. While Mrs. Albertson was in the front part of the store, the man approached her and drew a gun from his pocket. He told her to accompany him to the back of the store and, if she did so, she would not be injured.

Mrs. Albertson has no recollection of the subsequent events. The evidence shows Mrs. Albertson was beaten severely at the front of the store and then dragged to the rear of the store where she was again beaten. The injuries inflicted were consistent with "pistol whipping." Over 100 stitches were needed to close her scalp and facial wounds. Facial and skull fractures were inflicted. Nothing was stolen from the shop. Defendant was convicted of the aggravated battery and aggravated kidnapping of Mrs. Albertson.

On appeal defendant raises fourteen points of alleged error.

For his first issue defendant contends he was not brought to trial within the 180-day period required by K.S.A. 22-4303 (a part of the Uniform Mandatory Disposition of Detainers Act [K.S.A. 22-4301 *et seq.*]).

This issue turns on whether the trial continuance from June 6, 1983, to August 15, 1983, should be charged to the defendant or the State. Trial had been scheduled for June 20, 1983. On June 3, 1983, the State asked for a continuance from the June 20, 1983, date for the reason some key witnesses would be unavailable during the week of June 20. The trial had previously been rescheduled from May 23, 1983, at defendant's request. The State had been ready to proceed on May 23.

The court granted the State's motion for a continuance for good cause and advised the only two options were to delay the trial to August 15 or advance it to June 6. The State advised it could be ready on June 6. The parties were aware the 180-day period would expire prior to August 15. Defendant's counsel stated he had a conflict on June 6 as he had another criminal trial scheduled. Defendant contends the result was that he was, in effect, forced to ask for a continuance to August 15 and the same should not be charged to him. We have carefully reviewed the record and the contentions of the parties relative to this issue and conclude that, under the totality of the circumstances herein, this issue is without merit. The facts herein are readily distinguishable from those in *State v. Reeser*, 63

Ohio St.2d 189, 407 N.E.2d 25 (1980), relied on by defendant herein, where the setting of a trial on a date that the court would not be available was held to be "an obvious ploy to undercut" the requirements of the Ohio speedy trial statute.

For his second issue defendant contends the trial court erred in refusing to admit evidence of two polygraph examinations.

In *State v. Watkins*, 219 Kan. 81, 547 P.2d 810 (1976), this court held:

> "In the absence of a stipulation between the parties the results of a polygraph examination are not admissible in evidence." Syl. Para. 1.

There was no such stipulation herein and the State objected to admission of the results of the polygraph tests. We adhere to *State v. Watkins* and conclude this issue is without merit.

For his third issue defendant contends the trial court erred in refusing to admit evidence defendant had been misidentified as the perpetrator of a robbery which had occurred the day following the commission of the crimes herein in the same general vicinity. The two incidents were quite dissimilar. The robbery, although at gunpoint, did not involve any beating or other acts of personal violence. The perpetrator walked into the Topsy's Ice Cream Parlor, demanded money, received it, and left.

In the case before us, there was no evidence of a demand for money and nothing was taken. The victim was severely beaten, dragged to a part of the store which was hidden from view, and beaten again. The descriptions of the perpetrators of the criminal acts of the two incidents varied in some important particulars. The victim of the Topsy robbery identified defendant, but later concluded she had erred as the videotape of the crime showed the perpetrator had a large bald spot on the back of his head which was dissimilar to that possessed by defendant. We conclude the trial court did not err in finding the crimes were not similar and in refusing to admit evidence of the misidentification in the Topsy robbery. See *State v. Brown*, 230 Kan. 499, 638 P.2d 912 (1982), and *State v. Calvert*, 211 Kan. 174, 505 P.2d 1110 (1973).

The fourth issue concerns alleged error in failing to suppress photographic and physical lineup identifications of defendant.

The test in Kansas regarding the admissibility of the photographic and physical lineup identification of the defendant is whether the procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Mitchell*, 220 Kan. 700, 556 P.2d 874 (1976).

We find this issue to be without merit.

The fifth issue is alleged trial court error in failing to suppress the in-court identifications of the defendant by the eyewitnesses. Applying the principles set forth in *State v. Ponds*, 227 Kan. 627, 608 P.2d 946 (1980), we find this issue to be without merit.

The sixth issue is whether there was sufficient evidence to sustain the aggravated kidnapping convictions.

The evidence shows the victim was beaten and then dragged from a position in the front of the store where she could be seen from the sidewalk to a position in the rear of the store which made observation unlikely. She was savagely beaten after being taken to the rear of the store. We conclude the evidence was sufficient to sustain the aggravated kidnapping conviction.

The seventh issue contends the instruction given on the elements of aggravated kidnapping was vague and overly broad. The instruction was taken verbatim from PIK Crim.2d 56.25. A similar instruction was approved in *State v. Williams*, 226 Kan. 688, 602 P.2d 1332 (1979). We conclude this issue is without merit.

The eighth issue is alleged error in refusing to instruct on kidnapping as a lesser included offense of aggravated kidnapping.

The defense in the case was alibi. The evidence introduced would support conviction of aggravated kidnapping or not guilty. There was no evidence that only simple kidnapping occurred. We concluded this issue is without

merit. See *State v. Chatmon*, 234 Kan. 197, 671 P.2d 531 (1983).

The ninth issue is alleged error in admitting certain photographs of the victim.

Defendant contends the photographs were gruesome and prejudiced the jurors against him. Applying the principles set forth in *State v. Crispin*, 234 Kan. 104, 671 P.2d 502 (1983), and *State v. Salem*, 230 Kan. 341, 634 P.2d 1109 (1981), we find this issue to be without merit.

The tenth issue is alleged abuse of discretion in refusing defendant's request to have the jury view the crime scenes.

The decision whether to allow a jury to view the scene of a crime is in the sole discretion of the trial court (*State v. Morton*, 217 Kan. 642, 538 P.2d 675 [1975]), and will only be overturned on a finding of abuse of that discretion. (*State v. Mantz*, 222 Kan. 453, 565 P.2d 612 [1977]).

We find no abuse of discretion herein.

The balance of the issues have been carefully considered and are held to be without merit, although not specifically discussed in this opinion.

The judgment is affirmed.

Not designated for publication.

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No. 84-1250

In the Supreme Court of the United States

OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1) Whether or not the defendant was denied his Sixth Amendment Right of Compulsory Process when the Court excluded the defendant's proffer of evidence that he has previously been misidentified in an unrelated case in Missouri.

2) Is a Federal Question presented regarding whether or not the physical lineup was deficient. If so, is further guidance needed in this area?

3) Does the question of the admissibility of polygraph evidence pose a federal question in this case?

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No. 84-1250

In the Supreme Court of the United States

OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Kansas, respectfully requests that this Court deny the petition for writ of certiorari.

JURISDICTION

The petitioner asserts jurisdiction pursuant to Title 28, United States Code, §1257(3). The petitioner's brief, however, fails to raise any federal right, title, privilege or immunity which has been "specially set up or claimed" under 28 U.S.C. §1257(3). Of the three questions presented by the petitioner, only question (1) mentions any sort of federal right, title, privilege or immunity. Questions (2) and (3) fail to address any federal right, title, privilege or immunity whatsoever.

The petitioner also failed to raise the federal questions at the state court level. Once again, petitioner's question (1) was the only issue to even remotely discuss a federal right at the state court level. This consisted of the petitioner stating "The Sixth Amendment guarantees the accused compulsory process for obtaining witnesses in his favor. This right is part of the due process that the Fourteenth Amendment requires of the State." Federal questions have never been presented by the petitioner with regard to questions (2) and (3).

Supreme Court decisions have long been consistent and clear that federal questions must be raised and decided by the state court below before the Supreme Court has jurisdiction. *Maxwell v. Newbold,* 59 U.S. 511 (1856); *Baldwin v. Kansas,* 129 U.S. 52 (1889); *Herndon v. Georgia,* 295 U.S. 441 (1935); *Homes Ins. Co. v. Dick,* 281 U.S. 397 (1930); *Honeymoon v. Hanan,* 30 U.S. 14 (1937); and *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

A review of the Kansas Supreme Court decision, *State of Kansas v. Messer,* No. 54,873 (Kan. October 26, 1984), found in the petition, reveals that the questions presented were evidentiary and procedural in nature and did not deal with federal questions. Federal questions were neither raised nor decided at the state court level.

Therefore, because federal questions were not raised and decided below, this Court does not have jurisdiction.

REASONS FOR DENYING THE WRIT

QUESTION NUMBER 1. Throughout the pendency of this matter the petitioner has claimed that the two criminal incidents described were similar. The petitioner walked into an antique store, ordered the aged female

owner to "go to the back", and began to pistol whip the lady. She was then dragged to the back of the shop and beaten again. There was never a demand for money. The petitioner wished to present evidence of an armed robbery at a "snack shop" in Kansas City, Missouri wherein he was originally misidentified as the perpetrator. The victim of the armed robbery was not physically touched. The Kansas Supreme Court noted that "the two incidents were quite dissimilar." The petitioner has also noted that the perpetrator of the Topsy's robbery is a "look alike", or "double" of the petitioner. Once again the Kansas Supreme Court disagreed in noting "the descriptions of the perpetrators of the criminal acts of the two incidents varied in some important particulars." The petitioner does not raise a federal question. He simply asserts arguments regarding how the two criminal incidents are in fact similar.

The law in Kansas regarding the above question is clear. When the defendant attempts to present evidence that another party, and not he committed the crime with which the defendant is charged said evidence is inadmissible when the state relies on direct evidence to prove that the defendant in fact committed the crime. The only exception to this rule is a situation where there is direct evidence linking the third party to the crime. *State v. Calvert,* 211 Kan. 174, 505 P.2d 1110 (1973); *State v. Henderson,* 205 Kan. 231, 468 P.2d 136 (1970); *State v. Potts,* 205 Kan. 42, 468 P.2d 74 (1970).

In the case at bar, not only were the crimes dissimilar, but there was no direct evidence linking the other criminal to the crime with which the petitioner was charged. The law is clear. No federal question is involved. Further guidance is not needed on this issue.

QUESTION NUMBER 2. The Kansas Supreme Court in this case noted that the test in Kansas with regard to the admissibility of photographic and/or physical lineup identification is "whether the procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *State v. Mitchell*, 220 Kan. 700, 556 P.2d 874; *State v. Collins*, 214 Kan. 193, 518 P.2d 629.

The test stated above is consistent with the standard set by the United States Supreme Court. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967. There is no need for further guidance on this issue.

QUESTION NUMBER 3. In regard to the issue of the admissibility of polygraph evidence, the petitioner has at no time claimed a federal right, title, privilege or immunity. There continues to be no federal question presented in this regard and this Court is without jurisdiction.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-1250

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IN THE

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OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Kansas

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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7 pp

QUESTIONS PRESENTED

1. Whether or not the defendant was denied his Sixth Amendment Right of Compulsory Process when the Court refused to allow the defendant to present evidence that he had been previously misidentified for another man who is his "Look Alike" or "Double" who had committed a somewhat similar crime the very next day after this crime occurred in the same area.

2. Whether or not the physical lineup in this case was deficient because of the following factors: (1) the lineup contained only two men besides the defendant, neither of whom fit the description of the individual who committed the crime, (2) the witnesses sat together in the lineup room during the lineup at the same table, (3) there was some evidence of conversation between the witnesses during the lineup, (4) prior to the lineup the victim was told by a detective that the individual who attacked her was under arrest, had a previous criminal record, and that there would be other individuals at the lineup to identify him.

3. Whether or not polygraph evidence should be admissible or at least whether or not the trial court should conduct a hearing in relation to polygraph evidence submitted by the defendant.

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No. 84-1250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

PETITIONER'S RESPONSE IN QUESTION NUMBER ONE

The respondent's brief quoted the Kansas Supreme Court Opinion which noted "the descriptions of the perpetrators of the criminal acts of the two incidents varied in some important particulars." As can be seen from the charts included in the petitioner's Writ of Certiorari, the descriptions given by the witnesses in the two cases were uncannily similar. The petitioner has no idea why the Kansas Supreme Court made the statement it did about the descriptions. It was that statement that prompted the petitioner to file a motion for rehearing in the Kansas Supreme Court which was denied. It was never contended by the prosecution in this case that there were any material differences in the descriptions referred to by the Kansas Supreme Court. Except for some minor variances in the opinions of the witnesses as to the age of the man they saw, there were no material differences in their descriptions.

The public defender in the Topsy's case, after viewing the video tape of the Topsy's robbery, believed that the petitioner, Messer, was the man in the video tape. It was not until several frames were blown up that the public defender then realized that a mistaken identity had occurred and that the petitioner, Messer, was not the man in the video tape. That is how much the petitioner, Jerry Messer, looks like the Topsy's robber. The victim, in the Topsy's case, after being told that she was mistaken, said about the petitioner, Messer, "he must have a twin."

The trial judge in this case, The Honorable Robert Jones, compared photographs of the Topsy's robber with photographs of the petitioner, Messer, and commented "he certainly looks like the person who committed another robbery." The Judge also said, "I am inclined—the photographs do show that there is another person that resembles him." The Judge later called it a "strong resemblance." The Judge, however, then went on to rule that evidence of the Topsy's robbery and the misidentification of the petitioner therein was not admissable. His rationale was that the Topsy's robbery involved no violence and the Albertson's antique store incident did involve violence. It is important to note, however, that in the Topsy's case the victim cooperated. In the Albertson's case the victim did not cooperate. It does not appear in the Albertson's case that the violence was planned. It seems only logical to conclude that if the victim in the Albertson's case had cooperated, there may very well not have been any violence.

Whether or not it is proper to admit evidence that another individual committed a crime with which a defendant is charged, is a difficult question. However, one of the fundamental rights of a defendant in a criminal case is the defendant's right to call witnesses in his favor to show his innocence. When relevant, reliable evidence exists to show that someone else committed the crime,

such evidence must come in to protect defendants who are actually innocent.

PETITIONER'S RESPONSE IN QUESTION NUMBER TWO

The respondent contends that the petitioner did not raise a federal question with regards to the physical lineup. The petitioner cited the Fourteenth Amendment when setting out the Constitutional and Statutory Provisions Involved. It is perhaps elementary that the Due Process Clause of the Fifth and Fourteenth Amendments forbids an identification procedure which is unnecessarily suggestive. *Stovall vs. Denno*, 388 U.S. 293 (1967).

PETITIONER'S RESPONSE IN QUESTION NUMBER THREE

The respondent again contends that no federal question is involved with regards to the polygraph issue. In this case, the petitioner was denied the right to call a highly skilled polygraph examiner to present overwhelming polygraph evidence that the petitioner is actually innocent. The refusal of the trial court to allow the polygraph evidence denied the petitioner his Sixth Amendment Right to present evidence or witnesses in his behalf. Additionally, the fact that other defendants in other criminal cases have been able to avail themselves of this type of evidence is a violation of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons, as well as the reasons set out in petitioner's Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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